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CLERK

IN THE

Supreme Court of the United States

October Term, 1982

ANGELO MICHAEL MARINO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Whether the five-year statute of limitations for filing an indictment or instituting an information for a non-capital offense begins to run on the day the alleged offense is completed or on the following day.

PARTIES TO THE PROCEEDING IN THE COURT OF APPEALS

Plaintiff:
United States of America

Defendants:
Angelo Michael Marino
Anthony Joseph Bottiglio
Thomas Andrew Guerro
Lucien Joseph Provost

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1982

ANGELO MICHAEL MARINO,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit is reported at 694 F.2d 898 and is not reproduced in the Appendix annexed hereto. No opinion was rendered by the District Court for the Eastern District of New York. Portions of the trial transcript relevant to the District Court's decision may be found in the Appendix at pp. 1a-4a. The judgment of the Court of Appeals for the Second Circuit denying petition for rehearing may be found in the Appendix at 5a.

GROUNDS FOR JURISDICTION OF THIS COURT

The judgment of the United States Court of Appeals for the Second Circuit was entered on November 24, 1982. A timely petition for rehearing was denied

on January 11, 1983. A petition for certiorari by codefendant herein Joseph Provost was filed within 60 days of that date. Jurisdiction is invoked under 28 U.S.C. §1254(1).

TEXT OF STATUTE INVOLVED

United States Code, Title 28:

§3283 *Offenses not capital*

Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed.

STATEMENT OF THE CASE

This prosecution arose out of an alleged sale by appellant Marino, and co-defendant, Bottiglio, of twenty-five pounds of military type plastic explosives to an F.B.I. informer, Joseph Cantaloupe, on the 29th day of December, 1976. This sale allegedly took place in the presence of F.B.I. Special Agent, Nicholas Gianturco, who was acting in an undercover capacity at the time.

Despite the fact that the government was clearly on notice of the incident alleged, the indictment herein against the appellant and three co-defendants, charging them with conspiracy to commit various offenses involving the sale of explosive materials, was not rendered until the 29th day of December, 1981.

The indictment listed seven specific overt acts. The sixth overt act was the alleged sale of the explosives on the 29th day of December, 1976, when the purpose of the conspiracy obviously came to fruition. The seventh overt act was alleged to have occurred on the 2nd day of February, 1977 and consisted of an alleged declaration by a co-defendant to Cantaloupe, indicating that the defendants had lost money on the transaction because they had delivered five pounds of explosives too much.

It would seem that the depicting of the narrative statement attributed to the co-defendant, Provost, on the 2nd day of February, 1977, was an obvious attempt to overcome the effect of the bar provided in 18 U.S.C. 3282, to wit: the statute of limitations, since it is highly doubtful that a mere narrative of a past event can possibly be construed as an overt act in furtherance of a conspiracy.

The defendant moved the Trial Judge, Chief Judge Jack Weinstein, to dismiss the indictment on the grounds that it was barred by the five year statute of limitations in 18 U.S.C. 3282. They contended that the alleged statement on the 2nd day of February, 1977 was no more than a narrative of past events, which could not be construed as an overt act in furtherance of a conspiracy. It was argued that the obvious purpose of the conspiracy had been achieved with the sale of explosives on December 29, 1976, for which payment was made. Defense further argued that 18 U.S.C. 3282 with its bar of a prosecution of a crime after five years from its commission, should be interpreted to include the counting of the date of the

conclusion of the conspiracy in calculating the statute of limitations. Such interpretation would have barred the prosecution on the 29th day of December, 1976.

The government opposed the motion, urging that the day of the last overt act should not be calculated in the statute of limitations, and, therefore, the prosecution was properly commenced on the 29th day of December, 1976. The government also argued that the alleged statement attributed to the co-defendant, Provost, on the 2nd day of February, 1977 should be construed as a demand for additional monies, in view of the mistake in delivering an extra five pounds of explosives, and, therefore, by so construing this statement, the statute of limitations should be calculated not from the 29th day of December, 1976 but from the 2nd day of February, 1977. The government also urged that an additional statement was made by a co-defendant on the 30th day of December, 1976, albeit not charged in the indictment and that this uncharged declaration should also be construed a focal point for the calculation of the statute of limitations, which should likewise render the action here timely.

The District Court denied the defendants' motions on the ground that whether or not the conversation on the 2nd day of February, 1977 was in furtherance of the conspiracy, was one for the jury to decide. The Court also upheld the contention of the government that the day of the commission of the last overt act should not be calculated in determining the tolling time of the statute of limitations.

Following the denial of their motions, each of the defendants entered conditional pleas of guilty. Ap-

pellant plead guilty to the conspiracy charged in the indictment and defendants likewise made it clear that they were entering pleas of guilty only to a conspiracy that reached fruition on the 29th day of December, 1976 and reserved the right to appeal to the United States Court of Appeals on the issue where the indictment had been barred by the Statute of Limitations, as set forth in 18 U.S.C. 3282.

The Court of Appeals, in the interests of fairness, has interpreted the plea "one, to a conspiracy where the last overt act occurred on the 29th day of December, 1976" and has reviewed the issue of whether the indictment filed on the 29th day of December, 1981 was time barred.

The Court of Appeals in its decision, has recognized that since the plea bargain was conditioned by the right to appeal the issue of the bar of statute of limitations, it was the intent of the defendants to plead guilty to a conspiracy wherein the last overt act was committed on the 29th day of December, 1976.

It is in this climate that the Court of Appeals rendered its decision on the 24th day of November, 1982, written by Judge Kearse, affirming the judgment of conviction and holding that in the calculation of the statute of limitations, the date of the commission of the last overt act must not be calculated.

The opinion, in interpreting 18 U.S.C. 3282, as applied to this case, did not discuss the laches of the government in delaying this prosecution, especially where it is clear that a government agent was present and witness the alleged transaction with the informer.

Nor did the opinion discuss the rule of construction that a criminal statute must be strictly construed against the prosecution for a crime and, therefore, should be interpreted, where possible, in favor of repose.

The opinion of the Court relied strongly upon *Burnet v. Willingham Loan & Trust Co.*, 282 U.S. 437 (1931) which excluded the date of the event in the tolling of statute of limitations in the *civil* case. It is respectfully submitted that this rule of construction as enunciated by Judge Holmes 51 years ago, should not be applied in the construction of a criminal statute of repose and that unexplained laches in the case at bar should have been considered by the Court in its construction of 18 U.S.C. 3282, as applied to the case at bar.

It is respectfully submitted that the issue herein of statutory construction and the materials that should be considered in such construction is of sufficient importance for this Court to rehear the appeal herein or to hear the appeal in banc as authorized by Rule 35 of the Federal Rules of Federal Procedure.

REASONS FOR GRANTING THE WRIT

THE DECISION BELOW FIXES AN IMPROPER GAGE FOR CALCULATING STATUTE OF LIMITATIONS IN CRIMINAL CASES

18 U.S.C. 3282 should be interpreted in the case at bar to bar the prosecution of the indictment herein by including the date of the commission of the last overt act in the calculation of the statute of limitations.

On the 29th day of December, 1976 an alleged conspiracy to sell explosives to an undercover informer for the government, Joseph Cantaloupe, reached fruition when the explosives were delivered and the money was paid in consideration thereof. That was obviously the first day of the conspiracy. Present at this transaction was an F.B.I. special agent who was there, likewise, in an undercover capacity. Nevertheless, the government waited until the 29th day of December, 1981 to obtain an indictment against appellant and the co-defendants in this case. It is conceded that the right to a speedy trial does not accrue in the Federal jurisdiction until the criminal action has been commenced by an arrest or the filing of an accusatory instrument. *Marion v. U.S.*, 404 U.S. 307 (1971). Thus, pre-indictment and pre-arrest delay, for Federal purposes, do not create a speedy trial issue. However, it has been held that a request by a government agency to the United States Attorney, as required by law, to commence a criminal proceeding, will touch off the right to a speedy disposition. *U.S. v. Parrott*, 248 F. Supp. 196 D.C. (1965). Although the issue of speedy trial is not present in the case at bar, the rules of construction might well be helpful and the laches of the government in delaying a prosecution for five years and one day should be taken into account in favor of the defendant in construing the tolling provisions of 18 U.S.C. 3282.

18 U.S.C. 3282 provides as follows:

> "Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capitol, unless the indictment is

found or the information is instituted within five years next after such offense shall have been committed."

In *United States v. Brasco,* 516 F.2d 816 (2d Cir.), the Second Circuit discussed the application of statute of limitations to a criminal prosecution as follows:

> "Because the indictment was filed on October 23, 1973, the Government was only required to show that one overt act in furtherance of the conspiracy occurred *after* October 23, 1968, in order to avoid being time-barred. See *Grunewald v. United States,* 353 U.S. 391, 396-397, 77 S.Ct. 963, 1 L. Ed. 2d 931 (1957); *United States v. Portner,* 462 F. 2d 678, 681 (2d Circ.) *Cert. denied,* 409 U.S. 983, S. Ct. 319, 34 L. Ed. 2d 246 (1972)" *Id.* at 818. (Emphasis supplied.)

It is significant that this Court wrote that the government had the burden to show that an overt act occurred after a date and within five years thereof in order to overcome the toll of the statute of limitations.

In *Toussie v. United States,* 397 U.S. 112, 114 (1970) the Supreme Court offered the following rule of the construction to be applied in interpretation of statute of limitations, as follows:

> "The purpose of a statute of limitations is to limit exposure to criminal prosecution to a certain fixed period of time following the occurrence of those acts the legislature has decided to punish by criminal sanctions. Such a limitation is designed to protect individuals from having to defend themselves against charges when the basic facts may have become obscured by the passage of time and to minimize the

danger of official punishment because of acts in the far-distant past. Such a time limit may also have the salutary effect of encouraging law enforcement officials promptly to investigate suspected criminal activity. For these reasons and others, we have stated before the "principle that criminal limitations statutes are 'to be liberally interpreted in favor of repose,' *United States v. Scharton*, 285 U.S. 518, 522 (1932). *United States v. Habig*, 390 U.S. 222, 227 (1968). We have also said that '(s)tatutes of limitations normally begin to run when the crime is complete.' *Pendergast v. United States*, 317 U.S. 412, 418 (1943); see *United States v. Irvine*, 98 U.S. 450, 452 (1879). And Congress has declared a policy that the statute of limitations should not be extended '(e)xcept as otherwise expressly provided by law.' 18 U.S.C. Sec. 3282."

The purpose of statute of limitations is to discourage laches by the government and to shelter a defendant from having to prepare a defense after memory has dimmed the facts on which the indictment is based. Strict construction is indispensible to carry out the purposes of repose statute. It would be self-defeating for a statute of limitations to be construed as to exclude from calculation the date of commission of the crime irrespective of the fact that in *Burnet v. Willingham Loan & Trust Co.*, 282 U.S. 437 (1931) the Supreme Court held that the day of the act must not be calculated for statute of limitations purposes in a civil action. The difference between civil and criminal actions is sufficient to require a different rule of construction, and every presumption against prosecution should be indulged in favor of a defendant to shelter him from defending against a stale claim where memory is dimmed and witnesses disappeared.

Moreover, in a criminal case, the day the conspiracy is hatched is the first day of the crime, exposing the wrongdoer to sanctions, without delay.

In its decision, in footnote 5, the Second Circuit rejected any application of Rule 45 of the Federal Rules of Criminal Procedure which provides that "the day of the act or event from which the designated period of time began to run should not be included", as applicable to the interpretation of 18 U.S.C. 3282. The Court held that Rule 45 is only applicable to the calculation of the time required for service of papers and like procedures but not for the interpretation of statute of limitations.

In footnote 5 of the opinion, the Second Circuit made clear that Rule 45 is not dispositive of the interpretation to be applied to 18 U.S.C. 3282. However, the Court held that the language of Rule 45 is "nevertheless instructive". On the other hand, since it is not applicable, its "constructive nature" must be tempered with the purpose of statutes repose and the strict application of laches in criminal cases, as well as the realistic interpretation of when the crime accrues. This case presents an issue far beyond grammatical construction. It presents an issue requiring interpretation of a species of laches as applied to the prosecution of criminal cases. It is respectfully submitted that the date of the commission of a crime should not be excluded in calculation of statute of limitations since it is the first day of the crime given the policies

of presumption against prosecution of stale criminal actions.

Respectfully submitted,

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APPENDIX A—DECISION OF THE DISTRICT COURT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,
Plaintiff,

-against-

ANGELO MICHAEL MARINO, ANTHONY JOSEPH BOTTIGLIO, THOMAS ANDREW GUERRO, LUCIEN JOSEPH PROVOST,
Defendants.

CR-81-00691

United States Courthouse
Brooklyn, New York

March 10, 1982
9:30 a.m.

BEFORE:
HONORABLE JACK B. WEINSTEIN,
Chief Judge

Dennis Ford,
Court Reporter

***

THE COURT: I shall be happy to hear you gentlemen.

MR. CLAUSS: The Statute of Limitations, Judge.

THE COURT: I have read all of your papers.

MR. CLAUSS: There are two main issues here. One is the February 2, 1977 conversation which is an overt act in furtherance, if it is, and then the indictment is clearly timely.

If it is not, then the December 29th date becomes relevant and the computation of time—

THE COURT: It is a jury question, motion to dismiss on the grounds of application of Statute of Limitations is denied.

Next.

MR. CLAUSS: I have another motion, request production of evidence signifying the connection between defendant Provost and its conspiracy.

THE COURT: What's the connection between Provost and the conspiracy?

MR. GROVER: The February 2nd conversation.

THE COURT: He was a party to it?

MR. GROVER: It is a statement or conversation in the form of an admission and he was

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in fact, explosives, and I would ask the Court to allow us to have a hearing to determine whether or not there is any basis to believe that they had explosive potential.

THE COURT: No, I am not going to waste my time with such a hearing. You will have it during the trial. If they don't prove it is an explosive, I will dismiss.

MR. BERNE: Judge, I would like to speak to the Statute of Limitations question just briefly, if I may?

THE COURT: Yes.

MR. BERNE: I realize the Court ruled and called it a jury question, but I believe the case law which we cited is clear that essentially the statute means to run from the day of the last overt act, and the law also states that once the essential aim of the conspiracy has been completed, that marks the end of the conspiracy.

THE COURT: Well, the question is, whether the conspiracy was just to deliver explosives or to sell it, and if you are selling explosives, part of it is delivery and part is payment.

MR. BERNE: And, your Honor, payment was made, the February 2nd conversation is instigated by this informant and it is clear that the motive behind the call is to try to convince these people to get involved in other things.

It begins, he is concerned, and that's why I appended the copy to my papers. He is concerned because there has been no activity which obviously he wants and his position is, as an informant, gaining points for himself, so he makes this telephone call.

He is told right up front that there is no problem. In fact, while the other parties to the conversation aren't quite incredulous, they quickly inform him, the informant, that there is no problem and everything is fine.

Nothing else happens.

So, I think you had a fair reading that the face of that conversation shows that it is merely cumulative or repetitive or it is an opening to a conversation which really tries to start a second conspiracy.

So that—

THE COURT: Well, that's an argument you can make. It seems to me to be arguable.

MR. BERNE: But is is a question of law; isn't it your Honor?

THE COURT: I don't believe so. I think the jury will have to interpret it in the light of all the circumstances.

In any event they did indict you on the 29th day, that's five years, exactly.

MR. BERNE: Well, I think the 28th would be five years.

THE COURT: I don't believe you are right. I think the Government is perfectly right on that, beginning the next day—

MR. CLAUSS: I disagree, your Honor.

THE COURT: Well, that's a question of law, but I think we don't even have to arrive at that, because I think it is strictly a matter of fact for the jury.

MR. BERNE: I take it, your Honor, the ruling on one severence motion applies to all severence motions that were made?

THE COURT: Correct.

APPENDIX B—JUDGMENT OF THE COURT OF APPEALS DENYING PETITION FOR REHEARING

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the eleventh day of January, one thousand nine hundred and eighty-three.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

THOMAS ANDREW GUERRO, ANGELO MICHAEL MARINO, LUCIEN JOSEPH PROVOST, and ANTHONY JOSEPH BOTTIGLIO,
Defendants-Appellants.

No. 82-1103, 82-1131, 82-1137, 82-1139
UNITED STATES COURT OF APPEALS
FILED
JAN 11 1983
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the defendant-appellant, Angelo Michael Marino,

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge on the panel that heard the appeal and that no such judge has requested that a vote be taken thereon.

A. Daniel Fusaro, Clerk
s/ Francis X. Gindhart
by Francis X. Gindhart,
Chief Deputy Clerk